A

LEGAL VIEW

OF THE SEIZURE OF

MESSRS. MASON AND SLIDELL.

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All the facts of this case have not yet been officially communicated. We will assume, however, that the English mail steam-packet Trent was visited beyond the distance of a marine league from the shore, and that the neutral waters within that distance were not used by the United States' cruiser in watching her opportunity for the exercise of a belligerent right in the adjacent seas.

Mr. Webster, the most distinguished American expounder of international law, in his official correspondence with Lord Ashburton, declared that "a vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs." He also, in a subsequent letter to the same functionary, held the following language: "The ocean is the sphere of the law of nations; and any merchant vessel on the seas is by that law under the protection of the laws of her own nation, and may claim immunity, unless in cases in which that law allows her to be entered or visited."

The maritime right of visitation and search of neutral merchant vessels is a pure belligerent right, and can have no existence on the high seas during peace. It is allowed by the law of nations only in times of war, 1, for contraband, 2, for military persons, and 3, for despatches.

England, in the rightful exercise of her discretion, has adopted a theory of the present contest in America which has given great offence to the United States, although the latter were the first to furnish a precedent for its adoption by the course pursued in reference to the struggle between Spain and her colonies.

This theory assumes that the Confederate States are a nation actually at war with the United States, and having, so far as England is concerned, as perfect belligerent rights as any other nation whatever. It distinctly implies,—as there is no hybrid cross of nationalities known to the law of nations,—that Messrs. Mason and Slidell are the citizens of an independent nation other than the United States. We take it for granted that England will submit to all the legitimate consequences, whether injurious to herself or not, of her own theory, and that she will never lose sight of them in any reclamation she may make for an alleged violation of her neutral rights on board the Trent. It must be said, however, that the act of arrest, under a claim of belligerent right, involves, on the part of the United States, an emphatic renunciation of the theory recently adopted by their own government. The American Secretary of State, on the 30th of May last, in a despatch to the Minister of the United States at Paris, made the following explicit declaration : "The United States cannot for a moment allow the French Government to rest under the delusive belief that they will be content to have the Confederate States recognized as a belligerent power by States with which this nation is in amity. No concert of action among foreign states so recognizing the insurgents can reconcile the United States to such a proceeding, whatever may be the consequences of resistance."

If then, Messrs. Mason and Slidell are to be regarded as insurgent citizens of the United States, they are political offenders, and as such not only incapable of subjecting the neutral vessel on which they embark to the operation

of the right of search, but distinctly excepted from the provisions of the extradition treaty. The most cherished traditions of the history of England forbid her to sanction the forcible seizure of such persons while under the protection of her flag. Had they been undoubted citizens of the United States, guilty of atrocious felony, they could not have been seized by the United States on board the Trent on the high seas, without a flagrant infraction of the rights of neutral jurisdiction. It is perfectly clear that the arrest of such criminals could only be effected by a resort to the due process of the municipal law of England.

Were Messrs. Mason and Slidell, considering all the circumstances of the situation and voyage of the Trent, liable to capture as public enemies, and yet by a singular anomaly subject to punishment, under the municipal regulations of the United States, as domestic traitors ?

Let us now direct our special attention to the English cases of capture for the transportation of despatches and of military persons, as they are generally appealed to for the justification of the present seizure.

What are despatches ? Sir William Scott, in the case of the Caroline,* defined them to be communications "on the public business of the State, and *passing* between public persons for the public service." We are not yet accurately informed that any communications answering to this, or indeed to any other description, were in course of conveyance, in the instances before us. It would be an abuse of language to designate a letter of credence a despatch.

In a popular sense, every rebel, private or public, in all his communications, is necessarily hostile as against the United States ; and no act of his can be more offensively hostile than an attempt on his part to establish relations of amity between his government and a foreign State. But despatches must be of a *hostile and illegal character*, in the

* 6 Rob. Adm. Rep., p. 461.

sense of international law,* in order to subject the carrying ship to the appropriate penalty of confiscation.

In the examination of the cases, we must never lose sight of the nature of the voyage of the vessel. Was her voyage between the ports of one of the belligerents? Was it from a neutral port to a port of one of the belligerents? Was it from a port of one of the belligerents to a neutral port, or was it between two neutral ports?

The carrying by a neutral ship of despatches of the enemy, from his colonial port and colonial government to his home government, was decided by Sir William Scott, in the case of the Atalanta,† to be a criminal interposition in the war, impressing a hostile character upon the ship and subjecting her to the penalty of confiscation. Such despatches, he declared, must be of a *hostile* character on every *a priori* presumption.

The same illustrious judge, however, in 1808, during the war between England and France, in the case of the Caroline,‡ an American vessel, seized for conveying, from the neutral port of New York to Bordeaux, despatches for the French government from the French ambassador and consul resident in the United States, decreed restitution of the vessel. But inasmuch as, in his opinion, a neutral merchant vessel is under no obligation to carry the enemy's despatches to the enemy's port and government, he admitted the captor's right to inquire, before a prize-court, into the nature of the despatches,—there being no conclusive presumption of their hostile character in this case, as in that of the Atalanta. He proceeds to observe: "The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication *between them* can partake, in any degree, of the nature of hostility *against you*. The enemy may have his

* 1 Kent, p. 152. The Madison, Edwards' Adm. Rep., p. 226.

† 6 Rob. Adm. Rep., p. 440. ‡ Ibid., p. 461.

hostile projects to be attempted with the neutral State ; but your reliance is on the integrity of that neutral state that it will not favor nor participate in such designs, but as far as its own councils and actions are concerned, will oppose them.

"And if there should be private reason to suppose that this confidence in the good faith of the neutral state has a doubtful foundation, that is matter for the caution of the government, to be counteracted by just measures of preventive policy, but is no ground on which this court can pronounce that the neutral carrier has violated his duty by bearing despatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection."

In 1810, during the hostilities between England on the one hand and France and Denmark on the other, an English cruiser captured the neutral American ship Madison,* on her voyage home from a French port. She was found to be the carrier of despatches from the government of Denmark to the Danish consul-general, resident at Philadelphia. Sir William Scott held that, under the circumstances of the case, the conveyance of the despatches did not affix a hostile character to the ship, and that, though the ship was justly subject to the inconvenience of seizure and detention for inquiry into the character of the despatches, she was not liable to confiscation.

He expounds the law, in this case, in the following language : "Now, I am of opinion, that a communication from the *Danish* government to its own consul in *America*, does not necessarily imply any thing that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed ; such communications must be supposed to have reference to the business of the consul-general's office, which is to maintain the commercial relations of

* Edwards' Adm. Rep., p. 224.

Denmark with *America*. If such communications were interdicted, the functions of the official persons would cease altogether. It has been said that this communication of the *Danish* government, with one of its delegates in another country, through the medium of the *American* minister at *Paris*, is a matter in which the neutral government is not at liberty to interpose and carry on, and that the neutral government is not to concert measures with the enemy, for the purpose of assisting in communications relating solely to his own commerce. But I take this to be a correspondence in which the *American* government is itself interested. A *Danish* consul-general in *America*, is not stationed there merely for the purpose of *Danish* trade, but of *Danish-American* trade ; his functions relate to the joint commerce in which the two countries are engaged, and the case, therefore, falls within the principle which has been laid down in the case of the *Caroline*, in regard to despatches from the enemy to his ambassador resident in a neutral country. In the transmission of these papers *America* may have a concern and an interest also ; and, therefore, the case is not analogous to those in which neutral vessels have lent their services to convey despatches between an enemy's colony and the mother country."

The case of the Rapid,* which occurred in 1810, was that of a neutral ship, on a voyage from a neutral country to a port of a hostile nation, and carrying despatches or papers, which, if not strictly despatches, were deemed "mischievous in their own nature." These were concealed in an envelope, addressed to a private person at the port of destination. They were to be forwarded by him to the minister of the colonies of another hostile nation. They were proceeding to the home government of the enemy, from an agent of the enemy stationed in a neutral country by the governor-general of the colonies of the enemy, with

* Edwards' Adm. Rep., p. 228.

a view to relieve his colonial trade, and not to establish official relations with the government of the neutral country. They were conveying intelligence of importance. The master of the ship received them with a packet of private letters, and without knowledge of their contents. Sir William Scott, while admitting the justice of the detention of the ship, refused sentence of confiscation. In the course of his opinion he made the following observations: "I should certainly be extremely unwilling to incur the imputation of imposing any restrictions upon the correspondence which neutral nations are entitled to maintain with the enemy, or, as it was suggested in argument, to lay down a rule which would in effect deter masters of vessels from receiving on board any private letters, as they cannot know what they may contain. But it must be understood, that where a party, from want of proper caution, suffers despatches to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. If he is taking his departure from a hostile port in a hostile country, and still more, if the letters which are brought to him are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. On the other hand it is to be observed, that where the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance; and, therefore, it may be proper to make some allowance for any imposition which may be practised upon him."

It may possibly be inferred from these *dicta*, that, in the opinion of Sir William Scott, a neutral vessel, even on a voyage from one neutral port to another, engaged, with the knowledge of her master, in rendering to the enemy the special war-service of conveying to his government hos-

tile despatches from his own functionary, relating not to intercourse with a neutral government, but to the commerce and security of his colonial dominions, would be exposed to forfeiture.

A mere *obiter dictum* of Sir William Scott in 1807, in the case of the Orozembo,* has been cited as applicable to the case of the seizure of Messrs. Mason and Slidell. There is no parallelism in the facts of the two cases, and it is impossible to extend the reasoning in the one to the other. The Orozembo was a neutral ship *really* chartered by the enemy's government in the enemy's country. Thence she went to a neutral port only with a view to assume an ulterior colorable destination. At that neutral port she was *ostensibly* chartered to proceed to another neutral port, while she took on board, with the real purpose of transporting them to a colony of the enemy, not merely military persons in the service of the enemy, but other persons to be employed in civil departments in the colonial government of the enemy. With reference to these civil agents, Sir William Scott observed: "Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel, that may be let out for *a purpose so intimately connected with the hostile operations.*" He added: "But I will state *distinctly* that the principle on which I determine this case is, that the carrying military persons to the colony of the enemy, who are there to take on them the exercise of their military functions, will lead to condemnation."

It is obvious that the *dictum* of the judge in reference

* 6 Rob. Adm. Rep., p. 430.

to the civil agents was based, both on their destination to the enemy's colony, and on their employment in that quarter, for purposes directly auxiliary to the war, as their functions necessarily related to the safety of the colonial possessions which the other belligerent threatened to attack. As this class of persons has not been designated, in any of the proclamations of war or neutrality of England, as one not to be transported with immunity by the vessels of a neutral power, it is but just to infer that the English government has never sanctioned the *dictum*.

It would seem that destination to the enemy's dominions, —or to a country in the occupation of his armed forces,— of contraband goods and of military persons, who are sometimes called *quasi-contraband*, is necessary to constitute their transportation by a neutral ship an international offence, for it is difficult to perceive how, without such destination, they can be carried for the *direct* use or service of the enemy in war. The English proclamation of war of the 25th March, 1744, silent as to despatches, was restricted in terms to the carrying by neutral ships of contraband goods and soldiers "to any of the territories, lands, plantations, or countries of the French king." There appears no reason why destination to the enemy's country should not likewise be necessary to create the full character of hostile despatches, which, in more modern times, have been assimilated to contraband. Despatches cannot be justly considered hostile without having a direct and immediate tendency to assist the enemy in the war.

Even the carrying of military persons, and to the enemy's country, does not necessarily render a neutral ship liable to condemnation in the character of a hostile transport. The Friendship,* a neutral vessel, chartered under a contract with the enemy's government, sailed for the enemy's port, from a neutral port in America, with effective military officers and mariners returning from the service of

* 6 Rob. Adm. Rep., p. 420.

the enemy in his colonies in the West Indies. She was condemned, in 1807, as an enemy's transport by Sir William Scott, who, in the course of his opinion, made the following observations : "It would be a very different case if a vessel appeared to be carrying only a few *invalid* soldiers, or discharged sailors, taken on board by chance and at their own charge. * * * It is asked, will you lay down a principle that may be carried the length of preventing a military officer in the service of the enemy, from finding his way home in a neutral vessel from America to Europe ? If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court nor any other British tribunal has ever laid down the principle to that extent."

The immunity of a neutral ship,—if not engaged in a special transport service on account of the government of the enemy,—bound to a port of the enemy, and carrying even an able general of his, is urged by the great authority of Continental Europe, Hautefeuille,* in these words : "I have said that, in certain cases, a neutral ship may rightfully transport military persons in the service of one of the belligerents. A vessel—a packet-ship,† for example—is about to sail from a neutral port to a port of one of the nations at war. Individuals, belonging to the army of the sovereign of the place of destination, appear one by one, (*isolément,*) and engage passage on board of this vessel. There is in this circumstance, in my opinion, no interference with the war, (*immixtion aux hostilités,*) no act in violation of belligerent rights, even though there be among the passengers an able and skilful general, whose presence on the theatre of action may be the means of changing the for-

* Des droits et des devoirs des nations neutres en temps de guerre maritime, tome 2, p. 456.

† A ship that sails at stated times for carrying mails or passengers.

tunes of the war. The adverse belligerent cannot take offence in such a case, and hold the neutral to an account.

"It is to be distinctly remarked that the government, to which the military persons transported belong, interferes, in point of fact, in no way whatever. It keeps itself entirely aloof. The belligerent may, it is true, derive an advantage from the act of the neutral, but it is an indirect advantage; and if it were necessary to prohibit nations at peace from doing any thing whatever, through means of which nations at war might gain an advantage of this nature, it is obvious that the former could no longer have any intercourse whatever with the belligerents. For all intercourse springs from that mutual advantage which the parties engaged in it are supposed to enjoy. Navigation and commerce with belligerents would be completely destroyed, so far as neutrals are concerned. I think that I have sufficiently shown that the only acts prohibited are such as have a direct and immediate reference to the war, and not such as may have a remote and indirect connection with it. In the case we have supposed, the ship has violated no neutral duty, even though the captain knew all the circumstances relating to his passenger."

These opinions are in striking accordance with the general views which Chief-Justice Marshall expressed in the case of the Commercen,* while discussing the principles of the law of contraband and quasi-contraband. His language is as follows: "It is not true that every species of aid given to an enemy is an act of hostility which will justify our treating him who gives it, or his vessels, as hostile to us. * * * * That a neutral is friendly to our enemy, and continues to interchange good offices with him, can furnish no subject of complaint; for then all commerce with one belligerent would be deemed hostile by the other. The effect of commerce is to augment his resources, and enable

* 1 Wheaton, p. 382.

him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral, and manifesting no hostility to the opposing belligerent. It cannot, therefore, be molested by him while the same good offices are allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a *remote* and *consequential* effect of an act is not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be *direct* and *immediate*."

The principle on which the law of nations has denounced the penalty of confiscation against the merchant vessels of a neutral power, if engaged, in certain cases, in the transportation of the enemy's citizens or despatches, is that the act aids the enemy and injures his adversary, in violation of the duties of neutrality. This principle is made the prolific parent of many rhetorical deductions of an unlimited and indefinite nature, in the effort to maintain, by the law of nations, the right of the seizure of Messrs. Mason and Slidell. It is urged, for example, that the conveyance of ambassadors of the enemy to the courts of other countries may in its consequences, in your estimation, be of greater assistance to him and more dangerous and hurtful to you than the transportation of armed forces to his country, and that, therefore, you have a stronger right to prevent it. Again, it is claimed that the carrying of the enemy's despatches and of his bearers of despatches may be considered an act of such twofold noxiousness as to entitle you to either the forfeiture of the erring ship herself, by an admiralty tribunal administering international law, or to the seizure of the enemy-citizens bearing despatches, with a view to their punishment, under your own political authority. It is even further claimed that you have the right to seize, on board a neutral vessel on the high seas, enemy-citizens suspected of conceiving such despatches as may impart an additional false coloring to the mistaken

views already entertained by foreign courts of your domestic hostilities.

These expanded deductions are not worthy of serious consideration, for they merely tend to show not what the law of nations *really is*, but what, for the exigencies of the moment, it *ought to be*. The simple act of the transportation of the enemy's citizens or of his despatches, by the merchant ship of a neutral power, is not sufficient, in international law, to make her forfeit the immunities of an honest neutral. On the contrary, she is exempt from capture and condemnation, unless from the *military* character of the enemy's citizens on board, or from the *hostile* nature of his despatches, and other circumstances, the *direct* and *immediate*, not the remote and consequential, effect of the act of transportation is to assist the enemy in the war. Even Sir William Scott, as we have seen, intimates that the transportation to the enemy's port, of his officers and soldiers returning from colonial service, and of his despatches, relating solely to the administration of the affairs of his colonies, does not, in all cases, affix a character of hostility to the vessel of a neutral power. In every case of the carrying of military persons, or hostile despatches, of the enemy by the merchant vessel of a neutral power, where Sir William Scott did not decree restitution, the port of departure, or the port of destination, or both were within the enemy's jurisdiction ; and the transport service was either for military persons passing between different parts of the enemy's dominions, or for hostile despatches passing in like manner and relating to the domestic concerns of those dominions, and not to their foreign intercourse with a neutral government. The loosest *dicta* of Sir William Scott in reference to belligerent rights were all uttered in cases affecting communications, direct or indirect, between a mother country and her colonies. We are not aware that the case of any neutral vessel on a voyage from one neutral port to another was ever brought to adjudication before

him, for an alleged infraction of neutral obligations in transporting military persons or hostile despatches of the enemy.

Many an act of lawful assistance, in a consequential way, can be given by an impartial neutral power to one belligerent without injury, in the eye of international law, to the other belligerent. His case is then the common one of *damnum absque injuria*. The right of a neutral nation to hold diplomatic intercourse with either belligerent nation is unquestioned. The right of a neutral to hold general intercourse with either belligerent is the rule. The right of a belligerent to cut off this intercourse is the exception. The expounders of international law, in carefully enumerating all the objects for which the belligerent right of search is allowed, by a well-known legal maxim, necessarily exclude all others. The right of search being in derogation of the freedom of the common highway of nations, and involving penal consequences, must, according to another maxim, be strictly confined within the limits assigned by international law. Mr. Madison, as Secretary of State, in a despatch to Mr. Monroe, the Minister of the United States at London, opposing the doctrine of impressment, then maintained by England, observed that "nowhere will she find an exception to this freedom of the seas, and of neutral flags, which justifies the taking away of any person, not an enemy in military service, found on board a neutral vessel." *

The proclamation of her Majesty, the Queen of England, warns her subjects against doing any thing in violation or contravention of the law of nations, in the present hostilities in America, "by carrying officers, soldiers, despatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war, according

* See this despatch, dated the 5th of Jan., 1804, in American State Papers—Foreign Relations, vol. iii., p. 81.

to the law or modern usage of nations, for the use or service of either of the contending parties." This document, prepared by the law officers of the crown, was intended for the instruction and guidance of her Majesty's subjects. No one can seriously argue that the admonition of the proclamation against carrying officers and soldiers included private citizens or persons in the civil service of either of the belligerents. The phrase used by the French authorities to designate officers and soldiers is *hommes de guerre.*

The historical precedent most strenuously insisted on to justify the present seizure is of a somewhat remote date, and yet it was brought before a judicial tribunal. It is derived from the memorable case of Mr. Laurens, the American commissioner to Holland, who was captured by an English cruiser during the American Revolution. He was arrested off the coast of Newfoundland on board a vessel bound from a port of the revolted American colonies to Holland. It has been asserted that the vessel was Dutch. Yet from the preponderance of evidence, it seems clear that she was not only rebel property, but the property of the rebel American Congress. England asserted that the examination of the papers of Mr. Laurens disclosed, beyond all doubt, the previously suspected fact that, under the authority of Congress, he was about to conclude a commercial treaty with the city of Amsterdam. A disavowal of the transaction having been in vain demanded by England of Holland, hostilities ensued. For some time before this occurrence a latent enmity had existed between the two countries, from an undue partiality alleged to have been shown by the Dutch to the Americans.* The vessel on which Mr. Laurens took his passage certainly did not depart from a neutral port. If she was American, all analogy to the case of the seizure on board the Trent ceases. If she was a Dutch vessel, the seizure on board of her was a vio-

* Hughes' Hist. of England, vol. iii., p. 57.

lent measure resorted to by England on the ground of a breach of neutrality by the government of Holland itself. This proceeding cannot be regarded as a pacific step taken, under a right of search, in consequence of the unneutral conduct of a vessel sailing under the flag of a strictly impartial neutral power. Assuming that the United States have intercepted despatches on board the Trent, we cannot believe that they will afford a *casus belli* against England, by implicating her character as an honest neutral.

Professor Theophilus Parsons and the Hon. Edward Everett have cited the following passage contained in the opinion of Sir William Scott in the case of the Caroline, as authority for the arrest of Messrs. Mason and Slidell : "I have before said, that persons discharging the functions of ambassadors are, in a peculiar manner, objects of the protection and favor of the law of nations. The limits that are assigned to the operations of war against *them*, by *Vattel*, and other writers upon those subjects, are, that you may exercise your right of *war against them*, wherever the character of hostility exists : *you may stop the ambassador of your enemy on his passage.*" What did Sir William Scott intend by this oft-quoted declaration ? Simply, that you may stop not only a private citizen, but *even* the ambassador of your enemy on his passage, in certain cases warranted by the law of nations. Sir William Scott having never even asserted the right to stop the ambassador of your enemy on his passage *in a neutral vessel on the high seas*, there is no ground whatever to invoke his authority as justifying the seizure in the instance before us. Here we have an ambassador of the enemy arrested on his voyage on the high seas, not only in a neutral vessel, but in a neutral vessel bound from one neutral port to another. In the words of Vattel, "on the breaking out of a war we cease to be under any obligation of leaving the enemy in the free enjoyment of his rights ; on the contrary, we are justifiable in depriving him of them for the purpose of weakening him, and re-

ducing him to accept of equitable conditions. His people may also be attacked and seized wherever we have a right to commit acts of hostility. Not only, therefore, may we justly refuse a passage to the ministers whom our enemy sends to other sovereigns ; we may even arrest them if they attempt to pass privately, and without permission, through places belonging to our jurisdiction. Of such proceeding the last war furnishes a signal instance. A French ambassador, on his route to Berlin touched, through the imprudence of his guides, at a village within the electorate of Hanover, whose sovereign, the King of England, was at war with France. The minister was there arrested, and afterwards sent over to England. As his Britannic Majesty had in that instance only exerted the rights of war, neither the court of France nor that of Prussia complained of his conduct."

The former practice of England of impressing, by her cruisers, seamen, being English subjects, in time of war, on board of neutral merchant vessels, on the high seas, has been referred to as estopping England from any complaint in the affair of the Trent. The main reliance of England, in all her gigantic struggles, has been, from the nature of her insular position, her maritime power. She required men. On the plea of necessity for her safety and on the feudal principle of indissoluble allegiance, England claimed the right and exercised the practice of impressment. This was one of the causes of the last war between England and the United States. That war terminated without any express renunciation of the *right*. The *practice* of impressment, however, has been abolished by the existing laws and regulations for manning the royal navy, and cannot now be exercised on the seamen of England even in her own merchant service. In 1842 the United States sought a public disclaimer of the right from the special envoy of England to Washington, but he had no authority to make stipulations on the subject. He and his country, however, received, without objection from the Secretary of State of the United

States, the declaration, as the only rule to be hereafter submitted to by the Government of the United States, "that in every regularly documented American merchant-vessel the crew who navigate it will find their protection in the flag which is over them."

Under such circumstances as these, would it be consistent with the honor and dignity of England to permit the United States' Government to avail itself of a monarchic doctrine which has been resisted with all the energy of the Republic, in war as well as in peace, and which has ceased for more than half a century to be enforced? Can it be supposed that England will go yet farther, and acquiesce in the application of this doctrine to those persons who have never been declared to be its objects by any pretended ancient or modern law or usage of nations? Here surely we may apply the official language of the great statesman of Massachusetts, and, with a change of but three of his words, declare that *England* will take the liberty of bringing the cabinet of *Washington* into the presence of its own predecessors, and of citing for its consideration the conduct of the *Republican* Government itself.

The declaration to which we have just referred was uttered in 1850 by Mr. Webster, in his reply to the Chevalier Hülsemann, who had complained of the act of the United States in despatching abroad an agent to watch for a favorable moment to recognize the Hungarian republic, and to conclude with it a treaty of commerce. That reply then expressed the general sentiment of the Government of the United States, in regard to neutral rights and neutral duties, and its invariable policy in its foreign relations. We will make from it the following extract, supposing that a nation may be morally bound by the rules of conduct which it has prescribed to others: "It is the right of every independent state to enter into friendly relations with every other independent state. Of course, questions of prudence naturally arise in reference to new states, brought by suc-

cessful revolutions into the family of nations ; but it is not to be required of neutral powers that they should await the recognition of the new government by the parent state. No principle of public law has been more frequently acted upon, within the last thirty years, by the great powers of the world, than this. Within that period, eight or ten new states have established independent governments, within the limits of the colonial dominions of Spain on this continent ; and in Europe the same thing has been done by Belgium and Greece. The existence of all these governments was recognized by some of the leading powers of Europe, as well as by the United States, before it was acknowledged by the states from which they had separated themselves. If, therefore, the United States had gone so far as formally to acknowledge the independence of Hungary, although, as the result has proved, it would have been a precipitate step, and one from which no benefit would have resulted to either party ; it would not, nevertheless, have been an act against the law of nations, provided they took no part in her contest with Austria."

No single nation can make a law of nations. Let us, therefore, inquire in what light the great powers of Continental Europe will regard the seizure of Messrs. Mason and Slidell. Those powers, no less than the United States, have cast upon the court over which Sir William Scott presided,—a court which was the great oracle of England,—the imputation of making interpolations in the law of nations, with a view to extend the belligerent rights of the chief maritime nation of the world. France, speaking by the mouth of her great authority, Hautefeuille, whom we have already cited, in that portion of his work devoted to a consideration of the law governing the transportation of despatches, expresses dissent from the opinions of Sir William Scott on the subject, as carrying too far the rights of belligerents, and holds the following language : " I can give but little weight to the opinion of Sir William Scott. As

the official organ of the English admiralty, he was compelled to maintain the doctrines of his own country ; he has adorned them with all the lustre of his learning and talent. But the adoption of his system would put an end to all correspondence in time of war between neutrals and belligerents, and render it exceedingly difficult even between those nations simply witnessing the struggle with the utmost impartiality, except through the intervention of the strongest belligerent."

Hautefeuille proceeds to discuss, in the following language, the question of the transportation of despatches :

" Despatches may be conveyed from one neutral port to another neutral port ; from a neutral port to a port in the possession of the belligerent ; from a port of the belligerent to a neutral port, or, finally, from a port of the belligerent to some other point in like manner subject to the authority of the same sovereign, or occupied by his armies. It seems to me clear that we should discard from the discussion the first three supposed cases : whenever the place of departure, or the place of destination, is a neutral country, the conveyance of the despatch is, in my opinion, an innocent act —the neutral conveying the despatch commits no violation of his duties as a neutral. It is necessary to add a few observations as to the last case, where the despatch is sent from a place under the authority of the belligerent to a port also subject to his jurisdiction.

[1.] " One of the belligerents may charter a neutral vessel for the special purpose of transmitting an important despatch to a remote point of his own territory,—to a colony, —to a fleet on a station far from the mother country.

[2.] " But it may also happen, and this is the most frequent case, that this letter is sent through means of a neutral vessel employed in performing a common mail service, engaged alike in the conveyance of private and of public correspondence ; and performing this service not only for a particular object, but constantly and at stated and regular

intervals. Such are packet-ships generally, and particularly those engaged in the conveyance of despatches.

[3.] "It is customary among all maritime people when a merchant ship is setting sail for a distant port, for the postal department of the government to consign to the care of the captain all letters addressed to the place of destination and to the ports in its vicinity. The captain cannot refuse, without neglect of duty, to accept this responsibility. He thus finds himself the guardian, as it were, of the despatches intrusted to his care. The belligerent may make use of this channel for the transmission of his despatches.

"Is the neutral ship guilty in these three cases? Does it, in these three instances, commit an act which will render it liable to the forfeiture of its rights as a neutral? a direct act of war? In the first case, I do not hesitate to answer the question in the affirmative, even though the captain be ignorant of the contents of the despatches which he undertakes to carry. It is clear, in point of fact, that the captain must be apprised of the nature of the service which he is called on to perform. Chartered in a port of the belligerent, by the belligerent government or its agents, for a place under the authority of the same belligerent, and to convey a despatch, he cannot fail to consider himself a bearer of despatches, a sub-agent, of this government. He cannot conceal from himself the fact that he is about to perform an important service in behalf of the belligerent; for no other than a despatch of very great importance could suggest such precautions. If, then, he accepts this commission, he passes, in point of fact, into the service of the belligerent who employs him. He commits an act of the same nature with the transportation of troops, that is to say, an act of direct hostility, which causes him to forfeit his neutral character, to lose the privileges of his nationality, and which renders him liable to be treated as an enemy, by the other belligerent.

"It matters little whether the commission be volunta-

rily assumed, or whether it be imposed upon the agent by violence ; in either event the rule laid down in the preceding paragraph may be applied to him.

"Does the same principle prevail in the two other cases ? I think not. The packet-ship engaged in the mail service, receives all letters and all despatches delivered to it by the department, without any exception. It acts in this way with no special object in view ; it is not in the employment of the belligerent State ; it does nothing but discharge the duty which it is expected to fulfil in time of peace as well as in time of war.

"If, among the letters which it conveys, there be found hostile despatches, (*dépêches de guerre*) whatever their importance, the ship has failed to perform no duty of neutrality. It has not forfeited its national character, since it has done nothing but execute the commission confided to it, by its own government, by a neutral government,—a commission entirely consistent with the duties of neutrality. Moreover, it may be affirmed that it has performed no act in violation of belligerent rights."

Our author, after giving various illustrations of these views, meets the objection that the transportation, by a neutral merchant-ship of despatches, for one of the belligerents, may, under circumstances of conclusive legal innocence, nevertheless be an important service rendered to him, and a very injurious act to the other. "I admit this consequence," he adds ; "I even suppose the act to be much more injurious than the transportation of soldiers ; but the injury sustained is simply the indirect result of the service performed by the neutral, of the use which he has made of his freedom of action, of his independence, and of his rights. His duty imposes on him but two restrictions, the one forcing him to abstain from direct acts of war, and the other to withhold from the parties engaged in hostilities, articles contraband of war."

His final summary is thus expressed :

"I think, then, that I may safely conclude: 1. That the conveyance of the letters and despatches of belligerents, —whether by regular mail packet-ships, or by the first vessel setting sail, according to the universal practice of maritime nations before the employment of special ships for the transmission of public and private despatches,—is perfectly innocent, and can, in no case, be considered either an infraction of the duties of neutrality, or even as a contraband trade; 2. That the neutral ship chartered by one of the belligerents, or seized by him, and then sent in his service, from one of his ports to some other place under his jurisdiction, for the special purpose of conveying a hostile despatch, is guilty of a violation of the duties of neutrality, by taking a direct and active part in the war,—and that, consequently, it may be treated as an enemy, by the other belligerent."

If the law of nations be so incontestably in favor of the seizure as the United States' journals now claim,—with a unanimity and fervor in strange contrast to their first instinctive allusions to the affair,—it shows that the President and Cabinet were either ignorant of the plainest rule of the law of nations, or supine in the interest of the country, for it appears that they neither authorized nor directed a seizure in this particular or any kindred case.

It has been assumed, and probably with truth, that the master of the Trent received Messrs. Mason and Slidell on board *with a knowledge* of the reputed diplomatic capacity of each, the one an ambassador,—or, to speak more correctly, a public minister or commissioner,—of the Confederate States to England, and the other to France. Was this act a wrong in the sense of international law, giving illegal aid and comfort to the enemy,—a wrong for which the adverse belligerent might take redress into his own hands? We conceive not. We believe that as the Trent was in the course of a regular service, bound on a voyage between neutral ports, and even away from scenes of war, it was the duty of her master to presume conclusively that the mis-

sions of Messrs. Mason and Slidell were innocent when judged by the code of nations. He also was aware that his sovereign, whose integrity he could not question, had publicly proclaimed an equal neutrality between the contending parties ; and it was not for him to assume that any communications between the government either of Her Majesty the Queen, or of her ally the Emperor of the French, on the one hand, and the ambassadors of the Confederate States on the other, could partake in any degree of the nature of hostility against the United States. The recognized functions of an ambassador are to promote and perpetuate relations of amity between his own government and the neutral State to which he is accredited, and not to attempt hostile projects with that neutral State.

It appears to us that we must in a great measure abandon forever the freedom of the seas and the external interests of neutral States, if all intercourse, even diplomatic intercourse, between neutral States and the enemy's country may be interdicted by the adverse belligerent,—if neutral ships, on the high seas, known to be in the regular course of their employment between neutral ports, may of right be captured and condemned by the adverse belligerent for the conveyance of any communication which may be pronounced a despatch of an offensive tendency to him,—and if from those ships, not even brought to adjudication, may be forcibly removed any citizen or subject of his enemy capable of composing, or carrying, a despatch.* We are somewhat surprised that doctrines of this kind have found an advocate in the late special champion of neutral rights, the United States of America. Our examination of the

* Mr. Madison, in the very able State paper before referred to, portrays vividly the evil consequences of a principle which would permit the officer of an armed ship of a belligerent power to decide in an arbitrary and summary manner,—without trial before any tribunal competent to award indemnity for an abuse of power,—whom he will abduct from a neutral ship.

English cases has brought us to the conclusion that England, in the zenith of her manifold and energetic operations of war, and with every temptation to extend belligerent rights on the ocean, as the supreme maritime power of the world, never sought to make interpolations such as these in the law of nations.

PRO LEGE.

December, 1861.